IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTIN KAPLAN	:	
	:	CIVIL ACTION
	:	
v.	:	
	:	NO. 03-CV-4988
	:	
UNITED STATES OF AMERICA	:	

UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO. 00-CR-0597
	:	
v.	:	
	:	
	:	
MARTIN KAPLAN	:	

SURRICK, J. **AUGUST 30, 2005**

MEMORANDUM & ORDER

Presently before the Court are Martin Kaplan's pro se Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. No. 34), the Government's Response thereto (Doc. No. 40), and Petitioner's Reply to the Government's Response (Doc. No. 41). For the following reasons, Petitioner's Motion will be denied.[1]

[1]Kaplan has filed a number of other Motions which we grant. Those motions are: (1) Petitioner Kaplan's Pro Se Motion To Proceed In Forma Pauperis (Doc. No. 33, Cr. No. 00-CR-0597); (2) Petitioner Kaplan's Motion Requesting Leave Of The Court To Amend 28 U.S.C. § 2255 Pursuant To Federal Rule Of Civil Procedure 15(a) (Doc No. 38, Cr. No. 00-CR-0597); and (3) Petitioner Kaplan's Motion Requesting Leave Of The Court To Amend 28 U.S.C. § 2255 Pursuant To Federal Rule Of Civil Procedure (Doc. No. 39, Cr. No. 00-CR-0597).

I. BACKGROUND

Martin Kaplan ("Kaplan") was indicted on September 27, 2000, on charges of possession of cocaine base with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) (Count 1); possession of cocaine base with the intent to distribute within 1,000 feet of a school property, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) (Count 2); being a felon in possession of a firearm, in violation of 21 U.S.C. § 922(g)(1) (Count 3); and being a felon in possession of ammunition, in violation of 21 U.S.C. § 922(g)(1) (Count 4). (Doc. No. 1.) On December 19, 2000, after a suppression hearing, Findings of Fact and Conclusions of Law were filed along with an Order denying Defendants' Motion To Suppress Evidence. (Doc. No. 17.) On December 26, 2000, Petitioner entered a plea of guilty to Counts 2, 3, and 4 in the Indictment.[2] (Doc. No. 19.) On April 19, 2001, Petitioner was sentenced to a total period of incarceration of 210 months, to be followed by a period of supervised release of eight (8) years.[3] Petitioner filed an appeal in the Third Circuit Court of Appeals. On May 17, 2002, the judgment of this Court was affirmed. *United States v. Kaplan*, 33 F. App'x 42 (3d Cir. 2002), *cert. denied*, 537 U.S. 918 (2002).

Kaplan filed the instant Motion alleging that counsel was ineffective because counsel: (1) failed to challenge the sufficiency of the Indictment; and (2) allowed Petitioner to enter a guilty plea that was not knowing and intelligent.[4] (Doc. No. 34.)

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[2]The Government withdrew Count 1 of the Indictment. (Doc. No. 19.)

[3]Kaplan had an Offense Level of 32 because he was a career offender who received a two-point reduction for acceptance of responsibility. He was a Criminal History Category VI. The Guideline range was 210-262 months.

[4]Specifically, Kaplan alleges that counsel was ineffective regarding the entry of his guilty plea because counsel: (1) misled him regarding the sufficiency of the evidence against him as to Counts 2 and 4 of the Indictment; (2) incorrectly advised him regarding the possible terms of his

II. LEGAL ANALYSIS

Kaplan asserts ineffective assistance of counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-prong test for evaluating a Sixth Amendment claim of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687. Both the "performance" and "prejudice" prongs of the *Strickland* test must be satisfied to establish a Sixth Amendment violation. *Id.*

To demonstrate that counsel's performance was deficient, a petitioner must show that counsel's representation fell below an "objective standard of reasonableness" based on the facts of the case, viewed at the time of counsel's conduct. *Id.* at 688, 690. A strong presumption exists that counsel's conduct falls within the wide range of reasonable professional assistance. *Id.* at 689; *see also id.* ("Judicial scrutiny of counsel's performance must be highly deferential."); *Kimmelman v. Morrison*, 477 U.S. 365, 382 (1986) ("*Strickland*'s standard, although by no means insurmountable, is highly demanding. . . . Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ . . . .").

To establish prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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sentence; and (3) allowed the Court to enter Kaplan's guilty plea even though the Court failed to ensure that he understood Counts 1 and 2 of the Indictment. (Doc. No. 34.)

Strickland, 466 U.S. at 694. Courts define "reasonable probability" as "one which is sufficient to undermine the confidence in the outcome." *United States v. Bautista*, Cr. No. 01-323-06, 2005 U.S. Dist. LEXIS 16770, at *4 (E.D. Pa. Aug. 15, 2005) (quoting *Strickland*, 466 U.S. at 694). The effectiveness evaluation must be made in light of "the totality of the evidence before the judge or jury" in the case. *Strickland*, 466 U.S. at 695.

Kaplan asserts that counsel was ineffective because counsel failed to challenge the sufficiency of the Indictment. He contends that the Indictment was defective because Counts 1 and 2 did not specifically use the words "knowingly and intentionally." Under Federal Rule of Criminal Procedure 7, an indictment "must be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7. An indictment will be considered sufficient "if, when considered in its entirety, it adequately informs the defendant of the charges against [him] such that [he] may prepare a defense and invoke the double jeopardy clause when appropriate." *United States v. Whited*, 311 F.3d 259, 262 (3d Cir. 2002), *cert. denied*, 538 U.S. 1065 (2003); *see also United States v. Hodge*, 211 F.3d 74, 76 (3d Cir. 2000).

In this case, the Indictment states that Kaplan

> possessed *with the intent to distribute*, and aided and abetted the possession with the intent to distribute of more than five hundred (500) grams, that is approximately 985.1 grams, of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance, within 1,000 feet of the real property of the Philadelphia Christian Academy . . . .

(Doc. No. 1 at 2 (emphasis added).) Contrary to Petitioner's contention, the Indictment contains sufficient information regarding the elements of the offense to adequately inform him of the charge against him. It is not necessary that the Indictment include the exact wording of the statute. In addition, the Indictment certainly allows Kaplan to invoke the double jeopardy clause

as a bar to future prosecutions for the same offense. Counsel's performance was not deficient in failing to challenge the sufficiency of the Indictment.

Petitioner also asserts that counsel was ineffective because counsel caused Petitioner to enter a guilty plea that was not knowing and intelligent. However, Petitioner has failed to demonstrate that counsel's performance during the plea process was deficient in any respect.[5] When effectiveness of counsel is at issue during the plea process, "the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). When a defendant enters a guilty plea based on the advice of counsel, he must show that there is a reasonable probability that he would not have pled guilty absent his counsel's advice. *United States v. Kauffman*, 109 F.3d 186, 190 (3d Cir. 1997) (citing *Parry v. Rosemeyer*, 64 F.3d 110, 118 (3d Cir. 1995)).

Petitioner raises several grounds in support of his general argument that ineffective assistance of counsel led him to enter a guilty plea that was neither voluntary nor intelligent. Kaplan asserts that counsel misled him regarding the sufficiency of the evidence against him as to Counts 2 and 4 of the Indictment. (Doc. No. 34 at 10-11, 14.) When Kaplan was arrested, he was holding the keys to his car in his hand. When the police looked into the car, which was sitting on a public street, they saw what appeared to be illegal drugs. The police obtained a

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[5]Petitioner requests an evidentiary hearing to review the merits of his claims. It is within the Court's discretion to hold an evidentiary hearing on a § 2255 Motion. *Gov't of the Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989). A hearing need not be held, however, if the "motion and the files and records conclusively show that the prisoner is entitled to no relief." 28 U.S.C. § 2255; *see also United States v. Day*, 969 F.2d 39, 41-42 (3d Cir. 1992). Because the § 2255 Petition and the record conclusively show that Kaplan is entitled to no relief, we will not conduct an evidentiary hearing.

search warrant for the vehicle and thereafter conducted a search of the vehicle pursuant to the search warrant. Cocaine and ammunition were discovered in the vehicle. Before Kaplan entered his guilty plea, he filed a motion to suppress this evidence. (Doc. No. 11.) After the suppression hearing, Petitioner's Motion to Suppress was denied. (Doc. No. 17 at 7.) The Court found that the vehicle search "was proper and all items seized as a result of execution of the search warrant were properly seized and may be used as evidence at trial." (*Id.* at 8.)[6] Moreover, during the plea colloquy, the Government stated that it would have offered testimony at trial that the "quantity of drugs possessed under these circumstances would be consistent with an individual possessing a drug for distribution, not for their own personal use." (Tr. 12/26/00 at 28.) Since the cocaine and ammunition that were seized from Kaplan's locked car were admissible evidence that the Government would have offered at trial, and since the Government was prepared to offer evidence that Defendant possessed the drugs with the intent to distribute them, it would have made little sense for Kaplan to proceed to trial. Counsel's advice to enter a guilty plea was clearly appropriate.

Kaplan also argues that counsel incorrectly advised him regarding the possible sentence that he would receive. Specifically, Petitioner alleges that he was told that he would not receive more than an eight-year prison sentence and that he was not considered a "career criminal" under the Sentencing Guidelines. (Doc. No. 13 at 14.) A review of the record, however, reveals that Petitioner received accurate information from several sources with regard to the possible prison sentence and his status as a career offender. The Guilty Plea Agreement ("Agreement") states as

[6]At the Guilty Plea Hearing Kaplan admitted under oath that he had possession of the cocaine and ammunition. (Tr. 12/26/00 at 30.)

follows:

> The defendant understands, agrees and has had explained to him by counsel that the Court may impose the following statutory maximum and mandatory minimum sentences: Count 2, possession with the intent to distribute more than five hundred (500) grams of cocaine within 1,000 feet of a school: maximum of 80 years imprisonment, a mandatory minimum of 5 years imprisonment . . . ; Count 3, possession of a firearm by a convicted felon: maximum of 10 years imprisonment . . .; and Count 4, possession of a magazine and ammunition by a convicted felon: maximum of 10 years imprisonment . . . .

(Agreement at 3-4.) The Agreement further specifies that Kaplan faced a "maximum 100 years imprisonment, [and] a mandatory minimum of 5 years imprisonment," followed by a mandatory eight (8) years of supervised release. (*Id.* at 4.) Kaplan signed the Agreement and acknowledged that he had read it and understood its contents. The Court also advised Kaplan during the guilty plea colloquy of the possible maximum sentence and the mandatory minimum sentences that he could receive on each count of the Indictment. (Tr. 12/26/00 at 13.) All of this record evidence directly contradicts Petitioner's assertion that he "was misinformed that he would not receive more than eight years imprisonment." (Doc. No. 34 at 14.) In addition, the Agreement explicitly stated that "[t]he parties agree and stipulate that, for purposes of sentencing on Count 2 of the indictment, the defendant is a 'career offender.'"[7] (Agreement at 5.) During the colloquy, Kaplan acknowledged that the Court would treat him as a career offender for the purposes of sentencing. (Tr. 12/26/00 at 35-36.) We reject Kaplan's assertion that he was misled by counsel. The record clearly demonstrates that Kaplan fully understood both the possible sentence that he could receive as well as the fact that his career offender status would affect the Court's

[7]The Agreement, which Kaplan signed, also states that "the defendant and this lawyer have fully discussed this plea agreement." (Agreement at 6.)

determination of that sentence.[8]

Finally, Petitioner argues that counsel was ineffective for allowing the Court to accept his guilty plea when the Court failed to ensure that he understood the nature of two of the offenses to which he pled guilty, to wit (1) possession of cocaine base with the intent to distribute (Count 1); and (2) possession of cocaine base with the intent to distribute within 1,000 feet of a school property (Count 2).[9] (Doc. No. at 3-4, 7-8.) Under Federal Rule of Criminal Procedure 11, a district court is required to conduct a plea colloquy to ensure that the defendant understands, in part, "the nature of each charge to which the defendant is pleading."[10] Fed. R. Crim. P. 11(b)(1). As discussed above, the record of the guilty plea hearing contains ample evidence that Petitioner was fully aware of the nature of the charges in Count 2. Kaplan was advised on the record in open court that he was admitting that he "possessed with the intent to deliver more than 500 grams of cocaine within a thousand feet of a school." (Tr. 12/26/00 at 12.) Kaplan acknowledged under oath that he understood the charge. (*Id.* at 12-13.) Further, Kaplan

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[8]Petitioner also alleges that his sentence is invalid under *Blakely v. Washington*, 542 U.S. 296 (2004). (Doc. Nos. 38, 39.) We may not grant relief based upon Kaplan's *Blakely*/*Booker* claim. The Supreme Court's decision in *Booker* does not apply retroactively to § 2255 motions when the judgment was final as of January 12, 2005, the date on which *United States v. Booker*, 125 S. Ct. 738 (2005) was issued. *See Lloyd v. United States*, 407 F.3d 608, 615-16 (3d Cir. 2005). Kaplan's conviction became final within the meaning of § 2255 when his writ of certiorari to the Supreme Court was denied on October 7, 2002. *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999).

[9]Petitioner did not plead guilty to Count 1 of the Indictment.

[10]Under 21 U.S.C. § 841(a)(1), it is unlawful for "any person knowingly or intentionally - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance." 21 U.S.C. § 841(a)(1) (2000). Petitioner alleges that "[t]he omission of the essential elements 'knowingly and intentionally' from the indictment, plea agreement and plea Colloquy in this case requires this court to vacate petitioner's conviction under count two." (Doc. No. 34 at 4.)

admitted "the fact that I had possession of the . . . drugs." (*Id.* at 30.) Finally, Kaplan formally admitted that he was guilty of the crime of "possession with intent to distribute more than 500 grams of cocaine within a thousand feet of school property." (*Id.* at 37.) More than sufficient evidence exists in this record to support the proposition that Kaplan understood that he was admitting that he knowingly and intentionally possessed illegal drugs for the purpose of distribution and that he did this within 1,000 feet of a school. Counsel's representation was not deficient.

An appropriate Order follows.

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UNITED STATES OF AMERICA	:	
	:	CRIMINAL NO. 00-CR-0597
	:	
v.	:	
	:	
	:	
MARTIN KAPLAN	:	

ORDER

AND NOW, this 30th day of August, 2005, upon consideration of Martin Kaplan's Motion Under 28 U.S.C. § 2255 To Vacate, Set Aside, Or Correct Sentence By A Person In Federal Custody (Doc. No. 34, Cr. No. 00-CR-0597), it is ORDERED that the Motion is DENIED. A Certificate of Appealability is also DENIED.

IT IS SO ORDERED.

BY THE COURT:

S:/R. Barclay Surrick, Judge